BellSouth May 30, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions of the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS

BELLSOUTH CORPORATION
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SUMMARY

The Comments provide no reason for the Commission to deviate from the "pro-competitive, de-regulatory national policy framework" that Congress clearly intended Sections 251 and 252 of the Act to have. Those commenters encouraging the Commission to adopt minutely crafted rules not only suggest an approach that fails to fulfill the intent of Congress, but also would have the Commission act outside the scope of the authority granted to it by Congress. Rather than attempting to dominate the process, the Commission should view its role in implementing Sections 251 and 252 as one of support. In this way, the Commission will facilitate the negotiation process for which Congress has expressed a clear preference and permit the state commissions to exercise their statutory responsibilities unencumbered by federal obstructions.

At the outset, the 1996 Act did not fundamentally alter the jurisdictional division of responsibility between the Commission and the state commissions established in the 1934 Act. Those advocating detailed national rules either ignore the existence of Section 2(b) of the 1934 Act (United States Department of Justice, or "DOJ") or argue that Section 2(b) is impliedly repealed by Section 251 (AT&T). Neither position has merit. The legislative history makes it abundantly clear that the failure to enumerate Sections 251 and 252 in Section 2(b) to limit that Section's scope was not an oversight on the part of Congress. Arguments favoring implied preemption of state authority based on the Commission's implementation authority under Section 251 must fail in light of the express language of Section 601(c)(1), which prohibits implied preemption arising out of the 1996 Act.

Even if the Commission could adopt explicit national rules having a preemptive effect it should not do so. BellSouth respectfully submits that the Commission can best promote Congress' goals for the rapid development of local exchange and exchange access competition by rejecting its tentative conclusion that explicit national rules with preemptive effect will serve the public interest. Whatever benefits in terms of economic efficiency and uniformity that might result from such rules will come at the expense of bitter conflict with the state commissions and the Incumbent Local Exchange Carriers ("ILECs"). If the Commission goes down this road and does not prevail, meaningful competition will have suffered a major setback measured in terms of years.

Some parties argue that the Commission must adopt explicit, national rules because the ILECs will not negotiate in good faith and will thereby frustrate the will of Congress. The most charitable thing that can be said about such arguments is that they are purely speculative. The most accurate thing that can be said is that they are wrong.

As anticipated, most potential new entrants rallied around the Commission's proposals to adopt sweeping national imperatives for implementation of the unbundling and interconnection provisions of the Act. Indeed, many urged the Commission to develop rules in excruciating detail. Their motives are twofold and plainly clear: to skew and effectively undermine the Congressionally mandated negotiation process and to lay a groundwork of impossible tasks for Bell Operating Companies ("BOCs") to meet before entry into the interLATA market. The Commission should take a step back from the proposals in its Notice and consider how they have been seized upon by parties with such anticompetitive intent. Instead of facilitating such abuses of process with detailed, micro-regulation, the Commission should follow the clear indication from

Congress and adopt rules that support, rather than supplant, good faith negotiations between parties.

One of the most pivotal criteria upon which a request for interconnection or unbundling of a network element turns is the concept of technical feasibility. To the extent there was consensus among the parties in this area, it was on the point that the Commission's definition of technical feasibility must be a "dynamic" one. The best and most reasonable approach -- and, importantly, the one most consistent with the Act -- is to regard the definition of technical feasibility as "dynamic" if it is accommodating of a variety of results. That is, a dynamic application of the technical feasibility standard should accept variances under different circumstances, not dictate a result applicable across the board. Adoption of this dynamic and adaptable notion of technical feasibility is consistent with the Act's reliance on negotiation between the parties to determine what interconnection or unbundling is feasible under the circumstances.

BellSouth maintains that there is no need for the Commission to specify points of interconnection in its rules since the minimum set is already spelled out in the Act. Nonetheless, to the extent it must adopt rules to implement the Act, BellSouth agrees that the Commission should require no more than is mandated by the Act. Accordingly, the Commission should confirm that the core set of unbundled interconnection points consists of the trunk and loop side of the local switch, transport facilities, tandem facilities, and signaling transfer points. Of course, parties are free to negotiate additional points, but those should not become de facto mandatory "core" requirements. The Commission should view potential entrants' representations of substantial need for various unbundled elements with considerable skepticism. For example, both MCI and AT&T attempt to establish a need for electronic access to a number of ILEC "back

office" systems. The availability of such capabilities however, while clearly an appropriate subject for negotiation between the parties, is hardly necessary for successful participation by competitors for local exchange service

In a similar sense, the Commission needs to be wary of some of the hidden minutiae in the purported needs statements of various parties Most if not all, of the wish list items are fraught with nuances and subtle but powerful meanings Some are anticompetitive; some are simply not feasible; and others are susceptible to mutually satisfactory alternatives Moreover, implementation of one carrier's wish list may not prove satisfactory to another carrier The point is, requesting carriers have differing needs, ILECs have differing capabilities, and each request by a new competitor is likely to be affected by these differences The Commission's rulemaking proceeding is not conducive to consideration of the collective universe of wish list items Each item requires parsing at a level of detailed review that is not easily accommodated in policy-oriented comment and reply proceedings Indeed, this proceeding, with its range of substantive and extraordinarily important policy ramifications coupled with its fast-track treatment and constrained opportunities for input, is particularly ill-positioned to support detailed requirements of the type proffered by potential new local service providers

In lieu of detailed requirements, the Commission should adopt rules that establish a process to ensure that all carrier requests get fair and equal consideration, review, and discussion, as well as to ensure that potential new entrants are not able to abuse the privilege of making interconnection or unbundling requests of incumbent LECs The bona fide request ("BFR") process described by USTA provides an appropriate vehicle for achieving such a balanced result Such a BFR process, built on concepts of mutual good faith, exchange of information, appropriate

allocation of costs, and timely response, will foster cooperative rather than adversarial resolution of requests. Even for issues that cannot be resolved directly through negotiation based on this process, the process will help focus the dispute, facilitating the task that devolves upon the state as mediator or arbitrator.

A variety of parties advocate that specific federal rules be adopted to govern the pricing of interconnection and unbundled elements, transport and termination, and retail services offered at wholesale rates. In these parties' view, the Commission has the unfettered discretion to prescribe strict pricing rules that would bind the state commissions in carrying out their responsibilities under Section 252 of the Act. They champion cost methodologies that serve their distinct, albeit errant, view of the Act's requirements.

Beyond the intrusiveness of the approach advocated by these parties, there simply is no statutory basis for detailed pricing rules. Moreover, the cost model favored by most competitors would deprive the ILEC of recovering the costs of the network facilities, components and services that competitors use. Denying ILECs' cost recovery is contrary to the Act and would constitute unconstitutional taking of the LEC's property.

Nothing in Section 252 authorizes the Commission to establish implementing rules, let alone detailed pricing rules that would reduce the state commission to a non-substantive role under the Act. Indeed, whatever authority the Commission may have, it does not have the power to limit state commissions to prerogatives to those no greater than what the Commission's staff would have under delegated authority.

Section 252 enumerates the pricing standards. Those guidelines are to be implemented by the state commissions. If Congress wanted a single method to be followed by the state

commissions, then such method would have been set forth in the statute. Alternatively, if Congress wanted the Commission to determine the cost method, it would have expressly granted the Commission such authority as it has elsewhere in Section 251. Federally established pricing rules would obviate negotiations since such rules would predetermine prices. Likewise, they would negate the state commission's authority to determine whether prices are just and reasonable under Section 252 and substitute in its stead a mere ministerial obligation to see that the Commission's rules are carried out. This result is inconsistent with the intent of Congress and is contradicted by the express language of the statute.

Many commenters advocate the use of TSLRIC as the cost basis upon which to establish prices for interconnection and unbundled elements. A fundamental flaw in a TSLRIC or any incremental cost pricing approach advocated by many competitors is that it does not take into account joint and common costs. Despite arguments to the contrary, any approach that pegged the prices of interconnection and unbundled network elements to TSLRIC would result in a gross underrecovery of costs.

Permitting the recovery of joint and common costs does not cure the infirmities of TSLRIC as proposed in the Comments of some parties. While commenters would have the Commission believe that the TSLRIC methodology that they have proposed will measure forward-looking costs of an efficient firm, the fact of the matter is that the concept of TSLRIC that these parties are advocating is a measurement of forward-looking costs that is purely hypothetical without any firm connection to the reality of existing LEC networks. As presented, TSLRIC is a measurement of forward-looking costs when an entire network is being started from

scratch. Alternatively, if a network already exists, the TSLRIC method replaces it in its entirety. Neither alternative is a likely situation.

The crucial point that seems to be lost on the proponents of TSLRIC is that, even in the long run, current technology and capital equipment in place in the network do not become irrelevant for the provision of future services. The ILEC must take its existing network into account when quantifying its forward-looking economic costs. This assures the efficient operation of the existing network. While the Act may afford new entrants in the local market the opportunity to use the facilities and equipment of an ILEC, the Act also provides that ILECs can assess reasonable charges based on their costs of providing interconnection and network elements. Any other construction would be confiscatory.

There is substantial agreement that a primary objective of the Act is to encourage facilities based competition in the local exchange. A pricing standard based on hypothetical, optimal network costs which would create disincentives for new entrants to invest in their own local facilities can hardly be viewed as consistent with the Act's requirements.

Many parties urge the Commission to impose bill-and-keep for the purposes of establishing reciprocal compensation under the Act. These parties are undaunted by the plain language of the Act which requires that mutual compensation be based on each carrier's costs to transport and terminate interconnected traffic.

It should not be particularly surprising that the Act permits bill-and-keep arrangements only when they are established through arrangements voluntarily agreed to by the parties. An attempt by any commission to mandate bill-and-keep arrangements would constitute a taking

without just compensation in violation of the Takings Clause of the Fifth Amendment of the Constitution.

The legal infirmities associated with mandatory bill-and-keep are not overcome merely by characterizing the arrangement as interim. If the object is to reach some simple, cost-based approach for arriving at transport and termination charges, then the solution is to allow parties to negotiate. Each attempt by the Commission to create rules that displace negotiations as the primary means of reaching agreement will more than likely have the unintended consequence of complicating and slowing the implementation of the Act.

Under the provisions of Section 252(d)(3) of the Act, wholesale rates shall be based on retail rates less avoided costs. In keeping with their call for the Commission to prescribe rules that cover each and every element of the Act, some parties claim that the Commission should identify specific expense categories (based on the Uniform System of Accounts (USOA)) that should be used to determine avoided costs.

The Commission is in no position to identify avoided costs by specifying USOA expense accounts. Each expense category set forth in the USOA contains many different kinds of expenses. The categories are intended to represent broad groupings of expenses, not specific cost elements. Specification of USOA accounts would do little to identify specific expense items that would be included in a determination of avoided costs. Moreover, because the USOA categories are broad, there is some discretion regarding the particular USOA category to which a specific expense item is recorded. Thus, no single list of accounts would be applicable to all LECs.

Several commenters argue that there should be no or very narrow resale limitations. For example, AT&T takes the extreme position that the only resale limitation should be that a reseller could not resell a service at a lifeline rate to a non-eligible subscriber.

The statute recognizes that one form of reasonable limitation would be to preclude a reseller from reselling a service that is only available to one class of customer at retail to a different class of customer. Class of service distinctions are often employed by state commissions to further specific intrastate pricing policies. This Commission would be ill advised to intrude in this sphere of intrastate ratemaking by obstructing a state commission's ability to limit resale by class of service.

Not surprisingly, Interexchange Carriers ("IXCs") view the Section 251(c) as an opportunity to avoid Commission mandated access charges. There is nothing in their comments, however, that would support a statutory interpretation that would permit such a result. Indeed, to the contrary, not only is the statute clear that Section 251(c) unbundled elements may not be substituted for exchange access but also any other interpretation would be contrary to the Act's principle purpose of promoting competition in the local market.

BellSouth is committed to meeting its obligations under Section 251 and 252 of the Act. Its concern, however, is that under the guise of implementation, the Commission will be drawn in by the comments of some parties and attempt to create a cookbook approach to the provision of interconnection and unbundled network elements with a myriad of details and rigid instructions. Such an approach, which becomes mired in the particulars loses sight of the key, broad foundations of the Act--negotiation, state supervision and competition. For this reason, the Commission must avoid approaching implementation of Sections 251 and 252 in a traditional,

regulatory fashion It must stand back and allow the new regulatory paradigm to operate as Congress intended unencumbered by intrusive federal regulations.

BellSouth May 30, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS

BellSouth Corporation, BellSouth Enterprises, Inc. and BellSouth Telecommunications, Inc. (collectively "BellSouth") hereby submit their Reply Comments in the above referenced proceeding.[1]

I. INTRODUCTION

In the Notice, the Commission proposed an approach to implementing Section 251 that would be based on detailed federal rules and guidelines that would essentially regulate every aspect of the new framework for local competition. Simply the Commission would follow a traditional regulatory interventionist path and attempt to manage every aspect of carrier interconnection through the adoption of national standards and rules that enumerate each and every step that an incumbent local exchange carrier ("ILEC") must take to satisfy its obligations

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[1] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Notice of Proposed Rulemaking, released April 19, 1996 ("Notice").

under the Act.[2] Ironically, pursuit of this path can only serve to undermine the Act's primary goal--the speedy implementation of local exchange and exchange access competition pursuant to negotiated interconnection agreements.

It comes as no surprise that interexchange carriers ("IXCs"), competitive access providers ("CAPS") and others urge the Commission to create a complex regulatory web of regulations to entangle ILECs. Such entanglements would serve these parties' agendas--to slow the Bell Operating Companies ("BOCs") entry into in-region interLATA markets and to shackle ILECs with burdensome and unnecessary regulations and obtain an artificial advantage in the marketplace from the resulting asymmetrical regulation.

As discussed below, the Comments provide no support for the Commission to deviate from the "pro-competitive, de-regulatory, national policy framework" that Congress clearly intended Sections 251 and 252 of the Act to have.[3] Those commenters that encourage the Commission to adopt minutely crafted rules not only suggest an approach that fails to fulfill the intent of Congress but also would have the Commission act outside the scope of the authority granted to it by Congress. Rather than attempting to dominate the process, the Commission should view its role in implementing Sections 251 and 252 as one of support. In this way, the Commission will facilitate the negotiation process for which Congress has expressed a clear preference and permit the state commissions to exercise their statutory responsibilities unencumbered by federal obstructions.

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). All citations to the Act are consistent with the Notice and reference the Section numbers as they will be codified under Title 47 of the United States Code.

[3] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., Joint Explanatory Statement at 1 (1996).

II. ANY RULES ADOPTED BY THE COMMISSION MUST RESPECT THE JURISDICTIONAL DIVISION OF RESPONSIBILITY PRESCRIBED BY CONGRESS

The 1996 Act did not fundamentally alter the jurisdictional division of responsibility between the Commission and the state commissions established in the 1934 Act. The Commission's claim in Paragraph 26 of the Notice that it has "specific statutory direction" to prescribe a "procompetitive, deregulatory national policy framework" separate from the one prescribed by the 1996 Act itself finds no support in the language of Section 251(d)(1) and Section 253 of the 1996 Act. Indeed, the role of the Commission articulated by Section 251(d)(1) is "to establish regulations to implement the requirements of this section."[4] In its Comments, the Alabama Public Service Commission ("PSC") cites the language of Section 251(d)(3) of the 1996 Act, which expressly prohibits Commission regulations from preempting "any regulation, order, or policy of a State Commission" that "establishes access and interconnection obligations of local exchange carriers", is "consistent with the requirements of this section" and "does not substantially prevent implementation of the requirements of this section and the purposes of this part". The Alabama PSC then notes:

> The above-noted Congressional preservations of power to the states, and the carefully and narrowly defined preemptive language in the 1996 Act, clearly indicate that Congress did not intend to confer upon the FCC the broad preemptive authority which would be necessary to promulgate the explicit national rules envisioned by the FCC in the NPRM.[5]

Those advocating detailed national rules either ignore the existence of Section 2(b) of the 1934 Act (United States Department of Justice, or "DOJ") or argue that Section 2(b) is impliedly

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[4] 1996 Act, sec. 101, § 251(d)(1).

[5] Alabama PSC Comments at 7.

repealed by Section 251 (AT&T). Neither position has merit. NARUC's comments contain an extensive analysis of the statutory language and related jurisprudence governing the scope of legitimate preemption of state regulation by the Commission. NARUC notes that Section 2(b) expressly enumerates those other provisions of the Communications Act that condition its application.[6] Sections 251 and 252 are not among those enumerated sections.

As NARUC and several state commissions point out, the legislative history makes it abundantly clear that the failure to enumerate Sections 251 and 252 in Section 2(b) was not an oversight on the part of Congress. Indeed, at one point in the legislative debate leading to the passage of the 1996 Act, Section 2(b) included an amendment that would have excepted predecessor sections corresponding to Sections 251-252. Following lobbying by NARUC and the state commissions, Congress removed those provisions.[7] Therefore, the legislative history makes it clear that the limitations on Commission authority contained in Section 2(b) are not superseded by Sections 251-252.

AT&T argues that "the explicit provisions of the subsequently enacted Section 251 would impliedly repeal the provisions of Section 2(b) even if they could otherwise be found applicable."[8] The "explicit" language cited by AT&T, however, is Section 251(d)(1), which only "explicitly" requires the Commission to adopt implementing regulations.[9] AT&T also cites Section 251(d)(3),

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[6] NARUC Comments at 10.

[7] NARUC Comments at 10; Alabama PSC Comments at 4; Florida PSC Comments at 8.

[8] AT&T Comments at 6.

[9] Any "implied repeal" of Section 2(b) is belied by the legislative history cited above in which Congress first proposed to amend Section 2(b) to carve out Section 251, then reversed itself in the final bill at the request of NARUC. Implied repeal was also expressly prohibited by Congress in Section 601(c)(1), discussed infra.

discussed above, which is entitled "Preservation of State Access Regulations", a curious title indeed had Congress intended this section to "explicitly" authorize wholesale preemption of the states Indeed, the title of Section 251(d) itself "Implementation", belies any intent on the part of Congress that this section make a substantive change in the respective jurisdictional authority of the Commission and the state commissions

DOJ advances a similar "bootstrap" argument DOJ claims that neither the language or statutory history of the Act expressly preclude the Commission from promulgating pricing principles.[10]

Both AT&T and DOJ arguments favoring implied preemption of state authority based on the Commission's implementation authority under Section 251 must fail in light of the express language of Section 601(c)(1), which prohibits implied preemption arising out of the 1996 Act Section 601(c)(1) provides

> (c) FEDERAL, STATE AND LOCAL LAW -
> (1) NO IMPLIED EFFECT --This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided in such Act or amendments

As the Alabama PSC states

> Given the Supreme Court's general abhorrence for preemption by implication, and the unambiguous Congressional mandate of Section 601(c) of the 1996 Act, confining preemption to the express provisions of the Act, the jurisdictional arguments relied upon by the FCC to justify the imposition of overly-prescriptive national rules are clearly without merit. As noted previously, Congress knew the limited circumstances under which it wanted to preempt the states and did so expressly in the 1996 Act Congress also made it clear in § 601(c) of the 1996 Act, however, that where it did not specify preemption, the FCC was not to imply preemption based on corollary provisions or by inference.[11]

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[10] DOJ Comments at 24

[11] Alabama PSC Comments at 8-9

NARUC makes the same point in its Comments [12] Citing Freightliner Corporation v. Myrick, 115 S.Ct. 1483, 1487, NARUC states:

> Preemption by implication results when state law "is in actual conflict with federal law." Such implied preemption can only occur in one of two ways: (1) "where it is impossible for a private party to comply with both state and federal requirements", or (2) "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. In enacting § 601(c)(1), Congress explicitly stated that preemption cannot result from any such finding of implied conflict.

The cases cited at page 5 of AT&T's Comments are inapplicable. As AT&T itself correctly recognizes, those cases provide "that federal agency regulations will preempt any inconsistent state policies unless the federal statute provides otherwise."[13] In the 1996 Act, Section 601(c)(1) expressly "provides otherwise." Like it did in Section 2(b), Congress provided a rule of construction in Section 601(c)(1) that the Commission is not free to ignore. See Louisiana Public Service Commission v. FCC, 106 S. Ct. 1890 (1986).

III. EVEN IF THE COMMISSION COULD ADOPT EXPLICIT NATIONAL RULES HAVING PREEMPTIVE EFFECT, IT SHOULD NOT DO SO

The parties advocating explicit national rules advance a plethora of policy arguments as to why the Commission should preempt the negotiation process with rules that "radically narrow the range of permissible outcomes in the Section 252 proceedings."[14] Like the legal arguments advanced by these parties, the policy arguments also get things exactly backwards. As shown below, the issuance of restrictive, preemptive rules in August, 1996 will hinder, rather than promote, the development of competition for local exchange and exchange access services.

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12 NARUC Comments at 13.

13 AT&T Comments at 4-5.

14 AT&T Comments at 7.

A. Issuing Detailed, Preemptive Rules In August, 1996 Will Delay Local Exchange And Exchange Access Competition

The DOJ offers the following remarkable observation

> [T]he short time-frame given the Commission to promulgate the section 251 rules evidences a congressional belief that the desired industry changes be brought about quickly rather than after many iterations. That judgment also supports reliance on uniform national standards because there is no doubt that such standards can be implemented long before one could expect all fifty states (or even a substantial majority of them) to develop the necessary standards on so many issues, especially in light of the many other responsibilities that the states must exercise under the Act [15]

The DOJ needs to look at a calendar. Those parties who filed requests to negotiate interconnection agreements shortly after the February 8, 1996 effective date of the 1996 Act (and many did) are already "on the clock". Section 252(b)(1) provides that such parties may seek arbitration as soon as 135 days but not later than 160 days after requesting negotiation. Thus, arbitration demands may begin as early as the third week in June, 1996. The state commission then has nine months from the initial date negotiation was requested, to reach a decision under Section 252(b)(4)(C). Thus, for those instances in which no negotiated settlement can be reached, a binding arbitration award will be rendered as early as November, 1996. The DOJ also overlooks the fact that the statutory deadline applies to all interconnection negotiations simultaneously. Therefore, all fifty states (and the District of Columbia) will be developing standards simultaneously, and there is no reason to believe, based on the comments of the state commissions in this record, that they will fail to do so within the time frame set forth above.

By contrast, if the Commission undertakes to prescribe uniform national rules, its decision will likely become effective in August, 1996. The nine month process described above will then

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[15] DOJ Comments at 14

begin to run for those parties demanding arbitration under the new Commission rules. In addition, the Commission's new rules will be under a cloud pending the inevitable judicial review should the Commission preempt the states. This could add an additional two years before the status of the Commission's rules is finally determined. The start of meaningful local exchange competition could be delayed into the next century if the Commission attempts to preempt the states, regardless of the outcome of the judicial process, since potential interconnectors may be unwilling or unable to invest in competing facilities based networks until the judicial dust settles.

This scenario is feared by the state commissions. For example, the Alabama PSC states:

> Consumers will reap the benefits of competition much sooner if states are allowed to continue to move forward as they have been. Overly prescriptive national rules will impede competition rather than promote it, because the current competitive efforts of a state such as Alabama will be stifled. National rules that displace existing state rules will result in confusion, uncertainty and counterproductive regulatory conflict.[16]

The Public Staff of the North Carolina Utilities Commission offered the following observation in its Comments:

> Negotiations between the interconnecting parties are, as we have stated, already under way in North Carolina. If the FCC ...promulgates detailed rules with respect to interconnection, the FCC will, we submit, eviscerate those negotiations of any importance, and will also eviscerate the North Carolina Act as well as the regulations that the North Carolina Utilities Commission has already promulgated thereunder.[17]

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[16] Alabama PSC Comments at 11.

[17] North Carolina Public Staff Comments at 9-10.

The Georgia PSC offered Comments to the same effect.[18] NARUC also noted that detailed prescriptive rules by the Commission will likely impede state efforts to foster local competition and will precipitate additional litigation concerning state compliance.[19] NARUC states:

> To avoid blocking the progress these States have made, and to assure they are allowed to advance, the FCC's rules should be very general. It is unlikely that Congress meant to (1) halt or retard pro-competitive State initiatives when it passed the 1996 Act or (2) encourage additional litigation, at taxpayer expense, over State compliance issues.[20]

BellSouth respectfully submits that the Commission can best promote Congressional goals for the rapid development of local exchange and exchange access competition by rejecting its tentative conclusion that explicit national rules with preemptive effect will serve the public interest. Whatever benefits in terms of economic efficiency and uniformity that might result from such rules will come at the expense of bitter conflict with the state commissions and the ILECs. If the Commission goes down this road and does not prevail, meaningful competition will have suffered a major setback measured in terms of years.

B. The Commission Should Not Preempt The States On This Truncated Record

The comment and reply cycle in this proceeding have been so short relative to the magnitude and number of issues presented that it has been virtually impossible to give full consideration to the positions advanced by other parties to this proceeding. The Commission should not make fundamental policy decisions on such a record. Even advocates of explicit national rules, like the DOJ, simply punt to unnamed "others" in their comments when it comes to

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[18] Georgia PSC Comments at 8.

[19] NARUC Comments at 24.

[20] NARUC Comments at 25. The New York DPS echoes NARUC's concerns. See New York DPS Comments at 14.

specifics. For example, the DOJ advocates interconnection at any technically feasible point in the LEC's network, but offers no specifics as to what those points are:

> The Department does not offer the Commission a technical assessment of the precise points where interconnection to local telephone networks is feasible. Others are better suited to that task.[21]

The DOJ advocates extensive unbundling of network elements by the LECs, but offers no specific recommendations:

> At this stage, we leave to others the task of commenting on the specific levels of sub-element unbundling that is technically feasible at this time.[22]

The DOJ advocates adoption of a specific pricing standard to be applied to the LECs, but then admits the difficulty of implementing such a pricing standard and "offers no comment on the specific methodology or data contained in any of these studies."[23] With the record in such shape, it would be irresponsible, and probably illegal, for the Commission to adopt specific rules that would require fundamental restructuring of the LEC industry.

In addition to the lack of specifics in the parties' comments, the Commission's Notice contained no formal rule proposals. In an order released just two days before the initial Comments were due, the Commission invited parties to submit specific rule language with their Comments or Reply Comments.[24] Predictably, few parties filed any specific rule language with their Comments, and any meaningful dialog about rule language submitted with Reply Comments

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21 DOJ Comments at 16.

22 DOJ Comments at 21.

23 DOJ Comments at 33, n.11.

24 In the Matter of Implementation of the Local Competition of the Telecommunication Act of 1996, CC Docket No. 96-98, Order, DA 96-753, released May 14, 1996.

will be severely limited by the Commission's severe limitations on ex parte contacts in this proceeding.[25] Therefore, any specific rules adopted by the Commission based on the existing record will be imposed on the LECs with no meaningful opportunity for comment.

In light of these deficiencies in the record, BellSouth recommends that the Commission limit its action to adopting the minimum regulations required to implement Sections 251 and 252. This will satisfy the Congressional requirement contained in Section 251(d)(1) of the 1996 Act. If, upon due consideration of the record in this proceeding and the development of competition in the states, the Commission later decides that additional rules would serve the public interest, the Commission can issue a Further Notice of Proposed Rulemaking containing specific proposals and invite comment thereon by interested parties.

C. Arguments that the ILECs Will Not Negotiate In Good Faith Absent Explicit National Rules Are Speculative And Clearly Erroneous

Some parties argue that the Commission must adopt explicit, national rules because the ILECs will not negotiate in good faith and will thereby frustrate the will of Congress. The most charitable thing that can be said about such arguments is that they are purely speculative. The most accurate thing that can be said is that they are wrong. Perhaps the most egregious in this regard are the comments of the DOJ. Although the DOJ is the legal arm of the United States government, its Comments are long on policy pronouncements, but virtually devoid of legal analysis. In addition, the DOJ Comments show a degree of bias against the ILECs that is absolutely astounding.

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[25] Specifically, the Notice restricts ex parte comments to a total of ten pages per party, excluding cover letters. Notice, ¶ 291. "Ex parte filings in excess of this limit will not be considered as part of the record in this proceeding."

The DOJ begins by asserting that Congress' favored solution, voluntarily negotiated agreements between potential entrants and ILECs, will not occur because the ILECs will not negotiate in good faith. To support this conclusion, DOJ cites the predivestiture conduct of AT&T![26] DOJ also cites pending "complaints" by potential interconnectors against ILECs in proceedings before state regulators as evidence of ILEC failure to negotiate in good faith. The DOJ makes the remarkable statement: "However disputes of this kind may be resolved, that they occur at all evidences the problems that can arise in the absence of clear legal and regulatory standards guiding the process of negotiated interconnection."[27] Thus, the mere existence of a dispute between the ILEC and a potential interconnector is sufficient in the eyes of the DOJ to find the ILEC guilty of failure to negotiate in good faith. The possibility that potential interconnectors may not negotiate in good faith apparently never occurred to the DOJ. Nor does DOJ appear to recognize that intemperate statements like that quoted above may lead to additional, frivolous complaints that hamper negotiations and create unnecessary work for the state commissions.

The DOJ cites complaints by MFS against BellSouth in state regulatory proceedings in Florida and Georgia as evidence of the fruitlessness of negotiations.[28] In fact, these were not complaints but requests for arbitration under state law. Neither the Florida or Georgia commissions appear to share the DOJ's view that the existence of such arbitration requests mandates federal preemption. The Florida PSC notes that many of the provisions of the 1996 Act

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[26] DOJ Comments at 9-10.

[27] DOJ Comments at 10-11.

[28] DOJ Comments at 11, n. 4.